



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

William Lawler, Esq
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, NW, Suite 600
Washington, D C 20004

MAR 13 2008

RE MUR 5504
Heather Kovacs

Dear Mr Lawler

Based on a complaint filed with the Federal Election Commission on August 3, 2004, and information supplied by your client, Heather Kovacs, the Commission, on June 21, 2005, found that there was reason to believe Heather Kovacs violated 2 U S C § 441f, and instituted an investigation of this matter

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred

The Commission may or may not approve the General Counsel's recommendation Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days

You may also request an oral hearing before the Commission See Commission's "Policy Statement Establishing a Pilot Program for Probable Cause Hearings," 72 Fed Reg 7551 (Feb 16, 2007) Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing Any request for a hearing must

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be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement

Should you have any questions, please contact Delbert K. Rigby, the attorney assigned to this matter, at (202) 694-1650

Sincerely,



Thomasenia P. Duncan
General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

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3 In the Matter of)

4)
5 Heather Kovacs)

MUR 5504

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8 **GENERAL COUNSEL'S BRIEF**

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10 **I INTRODUCTION**

11 Complainant, a former employee, alleged that John Karoly, Jr , the President and
12 Treasurer of Karoly Law Offices, P C ("Karoly Law Offices"), caused Karoly Law Offices to
13 reimburse four other employees and their spouses, including secretary Heather Kovacs, for
14 \$13,000 in contributions to Gephardt for President ("Gephardt Committee") with the law firm's
15 corporate funds Mr Karoly, representing the four law firm employees and their spouses and
16 himself, responded by submitting identical cursory affidavits from himself and each alleged
17 conduit, which state, in their entirety "My contribution to the Richard Gephardt campaign was
18 not based upon any reimbursement and I received no reimbursement for same "

19 The Federal Election Commission ("Commission") found reason to believe that Heather
20 Kovacs violated 2 U S C § 441f by knowingly permitting her name to be used to effect a
21 contribution in the name of another from Karoly Law Offices In response to the reason to
22 believe finding, Kovacs, through new counsel, states that the Commission should dismiss the
23 matter because the complainant is a disgruntled former employee who was terminated for cause,
24 the complaint was filed a year after the events occurred and after complainant's unemployment
25 compensation claim was rejected, complainant had no personal knowledge of a reimbursement
26 by Karoly Law Offices, and the affidavit submitted by Kovacs is sufficient because it responds to
27 the complaint's allegations Kovacs also submitted documents in response to a Commission

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subpoena Upon receiving a deposition subpoena, however, Ms Kovacs asserted her Fifth Amendment privilege and declined to appear for a deposition Our investigation shows that Kovacs was reimbursed \$2,000 for her contribution to the Gephardt Committee Based on the information discussed below, this Office is prepared to recommend that the Commission find probable cause to believe that Heather Kovacs violated 2 U S C § 441f

II. SUMMARY OF THE RECORD

On September 28, 2003, the same day that other Karoly Law Offices employees and their spouses made contributions to the Gephardt Committee, Heather Kovacs wrote a check for \$2,000 to the Gephardt Committee for her contribution Prior to this contribution, Kovacs had never made a contribution to a federal candidate¹ On October 7, 2003, Karoly Law Offices cashed a check for \$12,000 On October 27, 2003, Kovacs deposited \$3,021.56 into her bank account, which included her regular biweekly paycheck, a cash deposit of \$1,700 and another deposit of \$60² Her bank account records show a pattern of Kovacs frequently depositing checks representing her biweekly salary payment or overtime payments minus a small portion During the period from March 2003 to February 2004, there is no other instance of Kovacs depositing an amount greater than the total of her salary and overtime payments

In an affidavit dated August 17, 2004, Ms Kovacs denied that she had been reimbursed for her contribution to the Gephardt Committee This affidavit, submitted when she was still represented by Karoly, was the same one submitted by all of Karoly's then clients (except it was

¹ Kovacs' net pay in 2003 from Karoly Law Offices was \$50,765

² This \$3,021.56 deposit was the single, largest deposit Kovacs made to her bank account between March 2003 and February 2004

not notarized) Gregory Paglianite, who was employed as a paralegal by Karoly Law Offices in 2003 but has since left that firm, disavowed the affidavit dated August 17, 2004 submitted in response to the complaint and has admitted in a more recent affidavit that he was solicited by Karoly to contribute to the Gephardt Committee, with the promise of reimbursement. See Paglianite affidavit dated June 27, 2006 at p 1. Paglianite wrote a check for \$4,000 dated September 28, 2003 to the Gephardt Committee, the only federal contribution ever made by Paglianite or his spouse. Subsequently, Karoly requested Jayann Brantley, who handled financial matters at the firm, to bring him cash. *Id.* After Brantley brought cash to Karoly, Karoly reimbursed Paglianite for his and his wife's contributions of \$4,000 to the Gephardt Committee. Paglianite deposited the \$4,000 in cash into his personal bank account on October 7, 2003. *Id.* Two other law firm employees who contributed to the Gephardt Committee deposited commensurate funds into their bank accounts on October 7, 2003.

Kovacs has never addressed a specific allegation in the complaint that in a June 25, 2004 telephone conversation she admitted to having been reimbursed for her contribution. Ms. Kovacs' new counsel claimed that she had submitted a second affidavit denying that she admitted to complainant in a telephone conversation that she had been reimbursed. The Commission received this second affidavit dated March 17, 2005, but it was neither signed nor notarized and only contained the signature symbol "/s/".³ Thereafter, Kovacs changed counsel again. She submitted documents in response to a Commission subpoena.

³ We pointed out the deficiencies in Kovacs' second affidavit to her new counsel. However, we never received a signed, notarized copy.

On February 10, 2006, we sent Kovacs a deposition subpoena to appear for testimony, but her appearance was postponed by mutual agreement. Subsequently, she declined to appear and asserted her Fifth Amendment privilege against self-incrimination. See letter from Kovacs' counsel to the Commission dated June 7, 2007. Karoly, as well as a current law firm employee and a former law firm employee who contributed to the Gephardt Committee and deposited commensurate funds into their accounts on October 7, 2003, also asserted their Fifth Amendment privileges, and declined to appear for depositions pursuant to Commission subpoenas.

III. ANALYSIS

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution. 2 U.S.C. § 441f. The evidence shows that Heather Kovacs allowed her name to be used to effect a contribution in the name of another by being reimbursed \$2,000 for her contribution to the Gephardt Committee in violation of 2 U.S.C. § 441f⁴.

In this matter, the evidence is sufficient to support a probable cause finding that Heather Kovacs violated 2 U.S.C. § 441f. Shortly after making her first ever contribution to a federal

⁴ Kovacs' original affidavit, her second affidavit that was neither personally signed nor notarized, and statements by Kovacs' counsel about the complainant or the complaint, should be regarded in the context of her decision not to testify. She was aware that this Office had information that contradicted, or at least called into serious question, those submissions, and therefore sought to depose her in order to elicit sworn testimony that was subject to cross-examination, follow-up, and clarification. Because she chose to invoke the Fifth Amendment or otherwise declined to appear, that opportunity was lost. For these types of reasons, federal courts have upheld a district court's power to strike or disregard testimony, live or in the form of an affidavit, from witnesses who assert the Fifth Amendment and refuse to answer the government's deposition testimony in order to shield their testimony from scrutiny. See e.g. *U.S. v. Parcells of Land*, 903 F.2d 36 (1st Cir. 1990), *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir.) *cert denied*, 488 U.S. 831 (1988) (To allow a witness to testify and then assert the Fifth Amendment to escape scrutiny would be "a positive invitation to mutilate the truth.") Although this Office is not suggesting following such precedent to strike Kovacs' affidavits or written submissions in this matter, the Commission should give little or no weight to them.

1 candidate, Kovacs made the single, largest deposit over a ten-month period into her bank account
2 on October 27, 2003, consisting of her regular pay check and an unexplained \$1,700 in cash, that
3 cannot be traced to the law firm's payroll records to regular pay, overtime pay or bonuses. It
4 appears that the deposit of \$1,700 in cash represents the \$2,000 that she was reimbursed for her
5 contribution to the Gephardt Committee, minus \$300, which for reasons unknown she did not
6 deposit. This evidence is corroborated by Paglianite's disavowal of his initial affidavit, which
7 was identical in content to Kovacs', and his admission in a more recent sworn affidavit that he
8 and his spouse were reimbursed for federal contributions by Karoly Law Offices at Karoly's
9 behest. The evidence also includes Paglianite depositing \$4,000 in cash into his bank account on
10 October 7, 2003, the same day that the law firm cashed a \$12,000 check, and by other Karoly
11 Law Offices' employees that contributed to the Gephardt Committee depositing commensurate
12 funds into their bank accounts on October 7, 2003.

13 The Commission is entitled to draw an adverse inference from Kovacs' refusal to testify
14 at a subpoenaed deposition. The adverse inference rule provides that "when a party has relevant
15 evidence within his control which he fails to produce, that failure gives rise to an inference that
16 the evidence is unfavorable to him." *International Union (UAW) v NLRB*, 459 F.2d 1329, 1336
17 (D.C. Cir. 1972), *see also, Arvin-Edison Water Storage Dist v Hodel*, 610 F. Supp. 1206, 1218
18 n.41 (D.D.C. 1985). The theory underlying this rule is that, all things being equal, "a party will
19 of his own volition introduce the strongest evidence available to prove his case." *International*
20 *Union (UAW)*, 459 F.2d at 1338. Conversely, if the party fails to introduce such evidence, it may
21 be inferred that the evidence was withheld because it contravened the position of the party.

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1 suppressing it *Id* Thus, when a party unreasonably resists a subpoena for relevant testimony or
2 documents, it can be inferred that the refusal to comply with the subpoena indicates that the
3 evidence or testimony would be adverse to the party's position *See id* at 1338-39 Moreover,
4 there is no need for an administrative agency to seek enforcement of the subpoena in court before
5 drawing an adverse inference from the resisting party's failure to comply with it *Id* at 1338-39

6 Invoking the Fifth Amendment does not preclude drawing an adverse inference against a
7 party in a civil action who refuses to testify in response to probative evidence offered against
8 him *Baxter v Palmigiano*, 425 U S 308, 318 (1976), *see also*, *SEC v International Loan*
9 *Network, Inc* , 770 F Supp 678, 695-96 (D D C 1991), *aff'd*, 968 F 2d 1304 (D C Cir 1992)
10 (court may draw adverse inference from party's refusal to testify based on Fifth Amendment),
11 *Pagel, Inc v SEC*, 803 F 2d 942, 946-47 (8th Cir 1986) (agency did not err in taking into
12 account adverse inference based on broker-dealer's invocation of Fifth Amendment privilege
13 against self-incrimination), *Cerrone v Shalala*, 3 F Supp 2d 1174, 1175 n 3, 1180 (D Colo
14 1998) (agency's finding, based in part on adverse inference drawn against disability benefit
15 recipient who invoked Fifth Amendment, was supported by substantial evidence)

16 Based on all the reasons stated, the Office of General Counsel is prepared to recommend
17 that the Commission find probable cause to believe Heather Kovacs violated 2 U S C § 441f

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IV. GENERAL COUNSEL'S RECOMMENDATION

1 Find probable cause to believe that Heather Kovacs violated 2 U S C § 441f

3/11/2008
Date

Thomasenia P. Duncan
Thomasenia P Duncan
General Counsel

Mark D Shonkwiler
Mark D Shonkwiler
Acting Deputy Associate General Counsel
For Enforcement

Susan L Lebeaux
Susan L Lebeaux
Assistant General Counsel

Delbert K. Rigsby
Delbert K Rigsby
Attorney

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